FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-235

G. M. LEASING CORP., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. App. A-14 to A-21), are not reported. The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 514 F. 2d 935.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1975 (Appendix C, *infra*, pp. 16a-17a). On June 17, 1975, the court denied a petition for rehearing by G. M. Leasing Corporation and also denied its suggestion of rehearing *en banc* (Appendix D, *infra*, pp. 18a-19a). The petition for a writ of certiorari was filed on August 13, 1975, and was granted on December 15, 1975, with respect to Question 2 (A.14). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The grant of certiorari was limited to a single question (A.14), which is:

> Whether tax agents of the United States acted illegally in seizing automobiles and documents of petitioner in violation of its constitutional rights when said seizures were made pursuant to an Internal Revenue jeopardy assessment.

STATEMENT

The respondents' statement of fact is slanted and not entirely supported by the record.

Throughout its brief, respondent implies that the taxpayer in this case, George I. Norman, Jr., was a delinquent and recalcitrant taxpayer who would take any steps to avoid paying his just taxes. Such is simply not the case.

Respondents began their scenario by implying that

the reason for the revenue service audit of Mr. Norman was based on his conviction of a felony of aiding and abetting the willful misapplication of bank funds, (Res. brief, page 3). In truth and in fact, Mr. George I. Norman, Jr., the taxpayer, had been audited for many years from 1964 until 1971 because he had substantial income and substantial deductions (R. Vol. I, pg. 25. As to substantial deductions, see A-26). Internal Revenue audits were more or less an ongoing occurrence in the taxpayer's business, rather than a result of the events which respondents have pointed out in its brief.

Throughout its brief, respondents state that the taxpayer was uncooperative and the agent was required to make a jeopardy assessment purely on third-party sources. In so asserting, and again attempting to distort the view of the taxpayer, Norman, respondents state:

> "In conducting his audit, Clayton received no information or cooperation from Norman and, therefore, had to rely upon third-party sources, including the records of stock brokerage firms." (Res. brief, page 4).

There is absolutely no evidence that agent Clayton ever requested assistance from the taxpayer or his representatives who had filed powers of attorney with the Internal Revenue Service. No summons were ever issued; (R. Vol. I, pg. 14), no subpoenas were ever served. The inference is just as clear that the election to make his audit from third-party sources was Internal Revenue agent's own election. He proceeded to do his audit,

much to the consternation of the taxpayer, by contacting business associates and brokerage firms with whom the taxpayer did business.

In trying to stretch the taxpayer's image from that of a reluctant or non-cooperative taxpayer to a taxpayer who actively hid his assets in an attempt to defeat collection, the respondents state:

> "Taxpayer's attempt to outwit the system consisted of failing to file returns, refusing to cooperate with an audit and seeking to defeat collection by concealing some of his assets in a sham corporation, such as petitioner" (Res. brief, page 23).

Respondents have never produced one iota of evidence that Norman's assets, standing in his own name, are not sufficient to pay the taxes due and owing. There is no evidence that the taxpayer has transferred all of his assets into "sham corporations". It might be noted that the assets of petitioner were originally seized by respondents not only on the basis that petitioner was an alter ego of George I. Norman, Jr., but also on the basis that it was a transferee (A. 71-72). The Internal Revenue Service was unable to produce any evidence that the taxpayer was insolvent or transferred his assets to petitioner for insufficient consideration and, therefore, the claim that petitioner was a transferee was dismissed and was not raised on this appeal. At any rate, to allege that the collection of taxes was in jeopardy because taxpayer had hidden all of his assets in sham corporations is simply unsupported by the evidence.

In an attempt to support their jeopardy determination the respondents imply that the Normans or their agents were attempting to hide propery from the Internal Revenue Service after the assessment (See brief on page 10). They assert that persons were removing boxes of material from the cottage office used by Norman and petitioner. The respondents state:

> "because these events indicate unknown persons were putting property believed to belong to Norman beyond the reach of the Internal Revenue Service, collection officers decided to seize the cottage, etc." (Res. brief, page 10).

The implication that Norman had anything to do with the removal of assets from the "cottage" is completely unsupported by the record. The inference is just as clear that the revenue agents who apparently were keeping the cottage under surveillance, (See Res. brief, page 10), observed a burgulary occuring and failed to take any action to prevent it.

The respondents assert that there was a danger posed to the collection of taxes because of Norman's fugitive status. Again, the respondents failed to prove and there is no evidence in the record that the taxpayer did not leave ample assets behind with his family to pay any taxes which were justly due and owing. In fact, large holdings of real estate were liened by the respondents. If Norman were a fugitive, he could not very well conceal the assets he left behind.

Respondents, in their statement, acknowledge that

Norman paid $280,000 in taxes for the year 1970, (n reality, the sum was closer to $290,000) (A-27). Then in attempting to support the image that the taxpayer Norman would not pay his tax and that collection was in jeopardy, respondents assert that Norman submitted to the Internal Revenue Service a check that was later dishonored for $405,125 in payment of his 1971 tax liability. For support of such assertion, respondents cite defendants' exhibit 11 (A-103). A reading of the record will show that defendant's exhibit 11 or A-103 was never received in evidence and that respondents assertion is, therefore, unsupported by the record. (R. Vol. I, pg. 137-139).

Respondents then try to transfer the image of the recalcitrant or delinquent taxpayer from Norman to his wife by saying that she, after being informed of the jeopardy assessment, and demand for payment being made, refused to pay the tax assessments (Res. brief, page 5). Such is simply not true. Mrs. Norman, being merely a housewife, and not accustomed to the business world nor the business of her husband, merely suggested to the agents that they should speak to her husband's attorney rather than her (A-56). Rather than speak to her attorney, the Internal Revenue Service agents merely began to seize assets.

The image attempted to be portrayed by the respondents, that the taxpayer, George I. Norman, Jr., was a delinquent and recalcitrant taxpayer who would take any steps to defeat collection of tax is a distortion. Although petitioner does not condone the fugitive status

of Norman, nor would petitioner suggest that Norman would pay more than was justly due and owing, petitioner believes that a fair statement of the facts should be presented to the Supreme Court. Norman was a businessman who made a very substantial income. He also had extremely high deductions and business expenses. He had always paid his taxes, but had been audited for many years by the Internal Revenue Service. In fact, the same agent of the Internal Revenue Service, Phillip Clayton, made the audits from 1964 to 1971. And it is based upon this premise that petitioner would suggest that the Court disregard the respondent's slanted and distorted statement of fact in favor of the petitioner's statement in its opening brief.

ARGUMENT

THE REASONS THAT RESPONDENTS ASSERT FOR DENYING THE APPLICABILITY OF THE FOURTH AMENDTO TAX SEIZURES ARE NOT VALID.

The respondents put forth four arguments to support its position and the Fourth Amendment is not violated when the Internal Revenue Service seizes property pursuant to a jeopardy assessment. Petitioner will rebut each one of these propositions.

Respondents first argument is: that this court has previously sustained the validity of such seizures and, therefore, on the basis of state decisis and the rationale of previous cases, such seizures should be upheld.

However, respondent fails to distinguish between a seizure pursuant to a normal assessment and a seizure pursuant to a jeopardy assessment. It is petitioner's position that a taxpayer or a person in petitioner's status is entitled to either a hearing or an independent magistrate's decision prior to the seizure of his property. Petitioner would refer the court to the authority cited in support of this proposition in its opening brief. Assuming that Fifth Amendment due process requires some sort of a hearing before a person may be deprived of his property, or, at least, immediately thereafter, and that generally the Fourth Amendment requires an independent magistrate's determination of probable cause before a seizure. Petitioner contends that there is great distinction between a seizure pursuant to a normal assessment and a seizure pursuant to a jeopardy assessment. Assuming the normal assessment situation, the taxpayer generally has had an opportunity to confer with the Internal Revenue Service concerning his taxes, and assuming that such conference has been unproductive or uncompromising, thereafter the taxpayer is sent a notice of deficiency which the taxpayer may contest in tax court and receive a tax court determination and no seizure would occur until after these events. Therefore, in the normal situation, the taxpayer has ample notice and opportunity for hearing, not only within the system, but by the tax court. However, in the jeopardy situation, the seizure takes place immediately, and there is no notice with the exception of the simultaneous demand for payment and seizure of assets, nor is there an opportunity for a hearing.

Respondents assert that the case of *Murray's Lessee v. Hoboken Land and Improvement Corp.*, 18 How, 272 contains this court's support of a proposition that a tax seizure does not violate the Fourth Amendment. Petitioner contends that the *Murray's Lessee* situation is more close to the normal tax assessment situation where there is notice and opportunity for hearing. The distress warrant issued by the Treasury in the *Murray's Lessee* case was only issued after a hearing and decision and judgment and notice of sale. Such a case can hardly be supportive of the jeopardy situation where properties are taken without notice.

The second case relied upon by the respondents, *Boyd v. United States*, 116 U.S. 616 (1886) is also distinguishable. That case was treated in petitioner's opening brief. The Court's language in the *Boyd* case, as pointed out in the opening brief, supports the petitioner's position, rather than respondent's position. The Court in *Boyd* stated, "it is our opinion, therefore, that a compulsory production of a man's private papers, . . . to forfeit his property is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure could be . . . ." (116 U..S at 622). This statement brings to mind the situation in the instant case where the revenue agents searched the taxpayer's and petitioner's office for the stated purpose of seizing records to find taxpayer's property (A. 24-25).

Respondents then attempt to gain support from recent cases of this Court regarding the search and seizure of automobiles. It should be recalled that this

case also involves the seizure of several luxury automobiles as well as the corporate records of petitioner. Respondents cite several of this Court's cases (see page 34 of Res. brief), to support the proposition that there is less expectation of privacy in an automobile than in a home and, therefore, there is a "constitutional difference" between a house and a car. While the respondents would not quarrel with this position with regards to a search or examination for evidence, petitioner cannot see the difference or a valid distinction between the two with respect to a seizure or dispossession of the owner of his interest therein. Respondents attempt to assert that a seizure by tax agents merely deprived a person of his proprietary interest in the property seized and there is no invasion of privacy interest protected by the Fourth Amendment. (See respondent's brief, page 35). Such a position cannot be supported. Obviously, th right of privacy, includes the right to be let alone from government interference and must also include the right to be secure in one's property and not have it taken, as well as merely searched. See, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *Coolidge v. New Hampshire*, 403 U.S. 443 (1973).

As further rationale for its position, respondents attempt to argue that by virtue of the tax lien the government itself has a proprietary interest in the property of taxpayer. Therefore, they argue, that the merely taking of possession is to protect its own proprietary interest, and, therefore, further leeway should be given to the government and no warrant required (Res. brief,

page 35-36). The respondents cite *Davis v. United States*, 328 U.S. 582.

Petitioner again responds that such a "bootstrap" doctrine is not acceptable in light of constitutional standards. It is not only the seizure, but the jeopardy assessment which allowed the seizure that petitioner contends violates the Fourth Amendment. It is no answer to such to say that because the jeopardy assessment creates a lien, therefore, the seizure is proper unless one examines the validity of or probable cause for the jeopardy assessment either by hearing or by an independent magistrate's finding of probable cause.

Respondents assert that *Bull v. United States*, 295 U.S. 247 supports its position and the holding in *Murray's Lessee, supra* (Res. brief, page 38). However, the *Bull* case points out that prior to the seizure or retention of property by the government, the taxpayer normally has an administrative agency to which he may turn prior to assessment and normally the taxpayer is given certain notice of the amount due at a date prior to its due date. See *Bull v. United States, supra* at 259-260.

The respondents assert that the decision of the United States Supreme Court and other federal courts favoring the Internal Revenue Service are based upon the rationale that

> "the very existence of government depends upon the prompt collection of the revenues. (Res. brief, page 38) . . . And if as those decisions

> indicate, the collection of taxes by summary administrative proceedings without a preseizure judicial hearing is constitutionally justified because of the government's urgent need to secure its revenue." (Res. brief, page 39).

Petitioner agrees that this rationale is often repeated in tax cases. Petitioner, however, would take issue. In this day and age of huge budget deficits and the theory of deficit spending to encourage the economy, petitioner contends that there is no "urgent need" for the government to hastily collect its revenue. At least, the need of the government to collect its revenues is no more urgent than the government's need to seize evidence from narcotics offenders, gamblers, or any other criminal suspect whom the Fourth Amendment protects.

It is therefore, petitioner's position that previous United States Supreme Court cases do not support respondents' position with respect to seizures pursuant to jeopardy assessment.

Respondents second argument, sub-paragraph (c) of respondents brief, asserts that the history of England and America would support warrantless seizures of delinquent taxpayer's property without regard to the Fourth Amendment. In rebuttal to this proposition of respondents, the petitioner will rely on its opening brief and further, simply state that a history of long standing abuse does not necessarily make it right.

Respondents third argument in sub-paragraph (d) of its brief is that the Fourth Amendment was not intended to prohibit general seizures of property without warrant, hearing or notice for tax purposes. For an opposing view regarding the framer's intent, petitioner refers the Court to its opening brief.

Respondents do admit that the Fourth Amendment was intended by its framers to prohibit general writs of assistance (Res. brief, page 55). Petitioner contends there is very little difference between a general writ of assistance and a jeopardy assessment together with a lien and levy on all taxpayer property and seizure pursuant thereto.

In an attempt to distinguish between writs of assistance and a tax levy, respondents in their brief state:

> "The vices of the writs of assistance which he described bear no resemblance to the collector's seizure of a taxpayer's property. Unlike the broad sanctions for investigatory searches conferred by writs of assistance, a tax levy is not investigatory in nature, but proceeds upon the existence of a specified data which the taxpayer is well aware, since demand for payment has already been made upon him. Moreover, the collector does not act with unbridled discretion, but is empowered to seize only an amount of properties sufficient to satisfy the debt." (Res. brief, page 58).

If such were true, the respondents position may have some substance. But in reality such a statement is not true. While a tax assessment is definite in amount, the value of property seized is often difficult of exact ascer-

tainment. In the present case, the Internal Revenue Service has seized over five luxury automobiles of petitioner, real estate, boats, and other personalty of taxpayer. As yet, no dollar value has ever been placed on this personalty to determine if the amount of the tax assessment has been reached.

Additionally, tax assessments such as in this case are often so high they bear little relationship to the taxes due and owing. Petitioner recognizes the holding in *Commissioner v. Shapiro*, No. 74-744 (March 8, 1976) allowing the taxpayer whose property has been seized to challenge whether any basis in fact, underlies the assessment. Such a limited challenge is not sufficient in a case such as the instant case. The 1970 tax assessment in the instant case showed liability of $280,000. Penalties and interest were assessed on that amount at $120,305.75. The total 1970 assessment was $406,099.37. The assessment has no relation to the amount due. Petitioner had paid $290,000.00 for which he had been given no credit. Substantial income was incorrectly added (A-27). No expenses or deductions allowed (A-26). Penalties and interest were compounded as if no payment was made. Consequently, the actual amount due was very small; yet thousands of dollars in value of real estate, luxury automobiles and other assets were seized.

It is difficult to rationalize the respondents' statement that the seizure was not investigatory at page 58 of its brief with page 74 wherein respondents state:

> "As the agents testified . . . they seized these records (petitioner's records) in order to ascertain whether they contained any sizable assets themselves (such as stock certificates) or any information concerning the location of other assets of the taxpayers."

How can respondents in good faith contend that the seizure was not investigatory when they themselves assert that one of the items that was seized was for the purpose of attempting to locate other assets of petitioner. Also, as was pointed out in the opening brief (page 17), Internal Revenue Service Intelligence agents participated in the seizures and the F.B.I. was made privy to the records seized.

On page 65 of respondents' brief, they assert:

> "Finally, the Court has explained the requirements for a judicial warrant, particularly describing the thing to be seized . . . but this principle has little force in a case where the collection agents are directed by Section 6331 of the Code to 'levy upon all property and rights to property' . . . beloning to such a person on which there is a lien . . . ."

How much more general can a writ of assistance be than the tax levy? The ancient writ of assistance, which respondents admit was underlying the prohibitions of the Fourth Amendment is a form of process issued by a Court to transfer the possession of property to enforce the payment of the King's debt or due and is issued without notice. See *Black's Law Dictionary*, 4th Ed. page 1785, citing 1 Maddox Hist. Ex. Ch.

675. Petitioner sees little distinction between the jeopardy assessment and seizure and the writ of assistance which respondents admit were prohibited by the Fourth Amendment.

Respondents' fourth and final argument against the Fourth Amendment applicability is that the reasons underlying the search warrant are not present in the jeopardy assessment tax seizure situation.

Petitioner argued in its main brief that the same reasons underlying the requirement for a search warrant are especially present in the situation of property seizure pursuant to a jeopardy tax assessment. As pointed out in the opening brief, one person was controlling in the entire events leading from assessment, jeopardy recommendation, recommendation that the petitioner was the alter ego of taxpayr and, finally the seizure (pages 29, 30, 31 of opening brief). Petitioner alleges that this particular agent acted with malice and the trial court agreed, although the appellate court reversed. There can be no question that the Internal Revenue Service agent was, at least, caught up in the "competitive business" of the enforcement of tax laws. It was this similar situation which the United States Supreme Court discussed when asserting the need for a detached and neutral magistrate's judgment rather than one who is caught up in the "competitive business" of law enforcement. *Coolidge v. New Hampshire, supra,* at 494 quoting *United States v. Johnson*, 333 U.S. 10.

Respondents contend that the situation in the in-

stant case presented exigent circumstances of the type which would normally dispense with the requirment of a search warrant. Respondents cite three separate facts which it claims produces those exigent circumstances. First, respondent asserts that the taxpayer refused to cooperate with an audit, (Res. brief, page 61). As pointed out in this reply brief's statement of fact, there is absolutely no evidence that the taxpayer was ever requested to cooperate or assist in the audit and that, in fact, the use of third party records by the Internal Revenue Service agent was his own election, rather than requesting assistance from the taxpayer.

Secondy, respondents point out that the taxpayer had concealed some of his assets in petitioner, a sham corporation. Petitioner presumes that such a statement, while completely at odds with the trial court's finding, may be in accord with the Tenth Circuit's statement that the petitioner had no separate existence apart from the taxpayer. Petitioner does quarrel with the statement that taxpayer concealed his assets and that petitioner was a "sham" corporation. Petitioner was a 'start up" corporation who had yet to commence business (see petitioner's opening brief, pages 10 and 11). While taxpayer transferred some assets to petitioner, there is no evidence that he "concealed" those assets or that G. M. Leasing did not pay valuable consideration therefor. Be that as it may, it is again pointed out, as it was in the statement of facts, that there is absolutely no evidence in the record that the taxpayer does no have sufficient assets available to satisfy his just taxes without the assets of petitioner corporation.

Finally, the third argument respondents give for claiming exigent circumstances is the fact that the taxpayer is a fugitive. The petitioner would think, on the contrary, that if a taxpayer were not present, he would have little ability to hide his assets.

With respect to the exigent circumstances claim, the respondents again bring out that material was removed from the building during the evening prior to the day of the seizure. Again, it must be asserted that there is absolutely no evidence that petitioner or taxpayer had anything to do with the removal of property from the premises that was seized as distinguished from the Internal Revenue Service observing a burgulary.

Respondents argue because of the above three facts, they had insufficient time to obtain a warrant. That argument is nonsense. Taxpayer's fugitive status had occurred weeks before the seizure. Taxpayer's alleged non-cooperation had proportedly been occurring months before the seizure. The removal of boxes from petitioner's and taxpayer's offices occurred two evenings before the date of seizure (A. 82-83) There was ample time to obtain a detached and neutral determination.

Next, respondents claim that exigent circumstances were present because of the movable nature of taxpayer's and petitioner's property (See page 62 of Res. brief).

This Court has spoken of dispensing of a search warrant and the delay in obtaining a warrant when the evidence is movable and easily destroyed. This occurs primarily in the search of car cases which are relied

upon by respondents. However, it is the evidence or the contraband that may be lost during the delay in obtaining a warrant, not the car. See *Coolidge v. New Hampshire*, 403 U.S. 443, at 460 (1971); citing *Chambers v. Maroney*, 399 U.S. 42. Respondents cannot seriously contend that petitioner would destroy its own luxury automobiles worth many thousands of dollars. These automobiles consisting of Stutz's and Rolls Royces and one Jaguar are difficult to sell because of the purchase price involved. Assuming that respondents were so fearful, their lien would protect them from transfer. Since automobiles are transferred by title, a lien could effectively be filed. Then, if respondents feared the concealing of the cars, they would simply have to summon or subpoena a corporate officer or family member who, under oath, would be required to disclose its whereabouts. Respondents argue that the summons method would not work in this case because Norman was a fugitive; however, it is clear he became a fugitive without taking the cars with him. Therefore, it would be the corporate officers or Norman family members who would be knowledgable about the whereabouts of the automobiles.

Respondents, after deciding that there were exigent circumstances, goes on to explain the three constitutional requirements laid down by this court for searches in the inspection context. They list: the demand of privacy, the public need for warrantless searches, and the standards to be employed in issuing the warrants. They then argue (Res. brief, page 66), that all three criteria are met in the tax levies and seizure situation.

Petitioner contends the opposite. Again, the respondents have argued that the petitioner's interest in the automobiles seized is a proprietary one, rather than a privacy interest which the Fourth Amendment protects. As pointed out before the right to privacy or the right to be let alone includes the right not to have ones' property interfered with or taken as well as merely examined.

The second criteria pointed out by the respondents is whether or not the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the suit. Again, petitioner quarrels with respondents view that they had insufficient time to obtain a warrant. In the present case the revenue officer who entered the offices of petitioner on March 21, 1973(A-19), and returned two days later and made the seizure that is the subject matter of this lawsuit (A-23). It certainly seems that sometime during those two days there would have been sufficient time to obtain a warrant without frustrating the purpose behind the search. The third consideration discussed in *Camera* and outlined by the respondents' brief (pages 68 and 69 of Res. brief), was the standards for determining whether or not to issue warrants. In connection with this matter, the respondents state:

> "Thus, the only factors for deciding whether to make such a levy is whether the taxpayer's refused to meet his obligation and whether he has property which could be used to satisfy the outstanding assessments. There are accordingly, almost no questions of disputed fact in a tax seizure with respect to which the antecedent evaluation of a magistrate would be required."

Respondents' position is almost so broad that everyone would be subject to seizure. Petitioner suggests that there are several matters which an independent magistrate should examine and evaluate:

(1) Whether or not there is probable cause to believe there is a deficiency in the taxpayer's taxes,

(2) Whether or not the collection of those taxes is in jeopardy.

(3) In this case, whether or not the entity having ownership of such assets is an alter ego, nominee, or transferee of taxpayer,

(4) Whether the assessment is so excessive to bear any relation to the taxes due and owing.

Contrary to respondents' position, the requirements and rationale of the Fourth Amendment are particularly applicable to jeopardy tax seizures as much as any other search and seizure.

RECENT CASES HAVE BEEN DECIDED SUPPORTING PETITIONER.

Since the grant of certiorari in this case, several cases have been decided in the United States Supreme Court that have some bearing on the instant case.

On January 13, 1976, the Supreme Court decided the case of *Laing v. United States*, which was consolidated with *United States v. Hall*, 96 U.S. Ct. 473

(1976). That case involved two separate situations of jeopardy assessment and subsequent seizures. The majority of the Supreme Court held with the taxpayer in each instance and ordered a return of the taxpayer's property on the theory that the Internal Revenue Service had failed to follow the proper procedural steps involved in a jeopardy assessment seizure. Mr. Justice Brennan in a concurring opinion applies the due process clause of the Fifth Amendment to jeopardy tax seizures. As Justice Brennan correctly points out, due process requires a hearing prior to a seizure unless the governmental interest at stake justifies postponing the hearing until after the seizure. If such a governmental interest is at stake and the seizure occurs prior to the hearing, then the hearing must be afforded promptly. Mr. Justice Brennan observes that the hearing provided by the assessment and statutory period for filing in tax court and subsequent trial do not meet the constitutional requirements of a prompt hearing. Mr. Justice Blackmun with whom Chief Justice Burger and Mr. Justice Rehnquist joined in dissenting on the basis that due process does not apply to require a hearing because of the overriding governmental need for prompt action in collection of taxes. Again, petitioner would urge the Court to reexamine the rationale of the government's urgent need for the prompt collection of revenue. This rationale has little validity or weight in this day and age.

The second pertinent tax case is *Commissioner v. Shapiro*, decided March 8, 1976. The majority of the Supreme Court in *Shapiro* distinguished the facts in *Phillips v. Commissioner*, 283 U.S. 589 (1931), which

was relied upon by the dissenting opinion in *Laing* and *Hall*. In *Shapiro*, the majority stated:

> "It is true that in *Phillips v. Commissioner supra*, this Court sustained against constitutional challenge, the statutory scheme created by congress for the litigation of tax disputes and in so doing referred both to the jeopardy assessment provision and the anti-injunction act . . . . However the *Phillips* case itself did not involve a jeopardy assessment and the taxpayer's assets could not have been taken or frozen in this case until he either had, or waived his right to a full and final adjudication of his tax liability before the tax court (then the Board of Tax Appeals)."

The United States Supreme Court in *Shapiro* decided that although the anti-injunction act would normally prohibit a taxpayer from suing the Internal Revenue Service, the taxpayer does have the right, in a jeopardy assessment and seizure situation, to challenge whether or not there is a basis in fact for the assessment. The Court stated:

> "Finally, it seems apparent that if the facts do not even disclose 'probable cause' (citing cases) . . . to support the assessment, the government would certainly be unable to prevail at trial. Thus the *Williams Packing* is consistent with the applicable constitutional standard."

Thus, it seems that the Supreme Court has attached constitutional standards to the jeopardy seizure of property and recognized the need for a prompt post-judicial hearing to determine whether or not the seizure had any basis in fact.

The instant case involves the identical situation as in the *Shapiro* case, although that question is not involved in the present grant of certiorari. In *Shapiro*, the government refused to answer interrogatories concerning the basis underlying the tax assessment. The Supreme Court said that they must so answer to determine whether or not there is a basis for the assessment and, if not, the anti-injunction act would not apply. In the present case, petitioner proceeded by way of deposition, rather than interrogatories and deposed the witness Roland Wise, who is the Director of the Internal Revenue for the State of Utah. The following interchange occurred:

> Q. And when did this assessment first come to your attention?
>
> MR. ANDOLINO, (Government's Attorney): I'll object to that question on the grounds it is immaterial and irrelevant to any issue presented in this case and not reasonably calculated to lead to admissible evidence insofar as assessments made against George and Frances Norman are conclusively presumed to be valid in an action for the return of property allegedly, wrongfully seized by the provisions of Section 7426 (c) of the *Internal Revenue Code* of 1954.
>
> Further, insofar as such questions seek disclosure of Federal tax liability of a third party not involved in this suit, said information is privileged, pursuant to the provisions of Section 7213 (a) of the Internal Revenue Code.

(It is anamolous to note that the government would refuse to disclose information concerning the tax liability of George I. Norman, Jr., on the grounds that he was a third party not involved in this suit, but would seize all of his property on the grounds petitioner was his alter ego.)

> I will therefore instruct the witness not to answer that question.
>
> MR. LEEDY: For the purpose of the record, may I point out that the suit is also for restraint of collection of taxes, which my understanding of the standard nut case indicates that an arbitrary assessment is grounds to give a Federal District Court jurisdiction.
>
> I also further point out for the record that Dr. Fred Norman is present, who has the power of attorney for George I. Norman, Jr., and would waive, right now, any privilege that George I. Norman, Jr., has to disclosure of that.
>
> Is that correct, Dr. Norman?
>
> DR. NORMAN: Indeed so.
>
> MR. ANDOLINO: Can we go off the record for a minute?
>
> (Whereupon counsel discussed the matter off the record.)
>
> * * * *
>
> MR. ANDOLINO: The government takes the position in its Motion to Strike that the al-

leged jurisdiction of this action is 7426, which is a suit for wrongful levy. Under 7426, the issue which can be brought before the Court is very narrow, in that it only determines the ownership of the property involved. There has been no other basis for jurisdiction stated. Insofar as an injunction, the injunctive relief would be specifically prohibited by Section 7421 (a), *Internal Revenue Code* of 1954.

Q. (By Mr. Leedy) Your answer, sir?

MR. ANDOLINO: I have instructed the witness not to answer.

Q. (By Mr. Leedy) Are you not going to answer under counsel's advice?

A. That's correct.

Q. Would you also refuse to answer any questions concerning the assessment of taxes against George I. Norman, Jr.?

A. That's correct.

Q. Did you, Mr. Wise, make a determination that the collection of taxes against George I. Norman, Jr., was in jeopardy.

MR. ANDOLINO: I will repeat my objections stated before, and instruct the witness not to answer.

. . . .

Q. (By Mr. Leedy) Would any questions I asked you regarding the determination of whether or not the collection of taxes was in jeopardy be the same?

MR. ANDOLINO: I have instructed the witness not to answer the question.

Q. (By Mr. Leedy) For the record, what is the answer?

A. I will not respond to that on the advice of counsel.

Q. Now, would your answer with respect to all questions concerning the determination of jeopardy on the collection of taxes against George I. Norman or Frances M. Norman be the same?

A. Yes, I would not answer on advice of counsel.

(Deposition of Roland V. Wise, pages 3-5.)

Thus, the very identical situation which the court upheld the taxpayer in *Shapiro* was present in the instant case.

Several cases were decided last term concerning the Fourth Amendment and the requirement for search warrants. The most illuminating case is *United States v. Martinez Fuerte, et al.*, No. 74-1560, decided July 6, 1976. In that case the Court discussed the exigent circumstances that were required for dispensing with the warrant requirement of the Fourth Amendment. The Court holds that to dispense with the warrant requirement in a search and seizure situation, there must be a balancing of public verses private interest. The public interest must outweigh the private interest to determine the weight to be given to the private interest. Inquiry should be made to determine whether the in-

ference with the Fourth Amendment interest involved was modest and whether the inquiry served significant needs. In the present case, the private interest affected is very substantial, much more substantial than that outlined in *Martinez Fuerte, supra.* In the present case involving the seizure of all of the assets of petitioner we have the deprivation of those assets, the right to use those assets and essentially to do business, dealing the death knell to the petitioner. In *Martinez Fuerte, et al.*, there was a brief, approximately five minute stop and observation. With respect to the public interest, while it has been often said that there is a substantial public interest in the prompt collection of revenue, the petitioner does not feel such an interest is any more significant than stopping narcotics smuggling. Further, it is difficult to see how the small delay that would occur in obtaining a neutral and detached determination of probable cause would in any way significantly interfere with the government's process. The present case is not a case involving liquid assets or a taxpayer who is about to leave the country. This case involves luxury automobiles for which there is no ready market which are not readily disposable, and a taxpayer who has already fled leaving behind such assets.

While one might argue the delay in obtaining a warrant in the situation such as in *Shapiro* where the taxpayer is about to leave the country to stand trial in Israel or in *Laing* where a suitcase containing more than $300,000 in cash was about to be taken across the border which would frustrate the collection of taxes, such frustration cannot be claimed in the instant case.

PETITIONER IS ENTITLED TO THE RELIEF IT SEEKS.

On pages 76 through 81 of respondents' brief, it argues that petitioner is not entitled to the relief it seeks. It argues that to require the return of the automobiles to the petitioner would be an exercise in futility as the government would simply seize again the automobiles and hold them for the tax liability of George I. Norman, Jr. Petitioner has several arguments in rebuttal to that position. The standard relief for violation of one's Fourth Amendment right is three-fold. First, the illegally seized information cannot be used in evidence. See *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961). Thus, the relief sought by petitioner for suppressions of any evidence obtained as a result of the illegal seizure is supported by the case law. The suppression theory was somewhat restricted last term with the Supreme Court's decision in *United States, et al v. Janis*, No. 74-958 (July 6, 1976). In the *Janis* case, the Court refused to suppress evidence obtained by a state police officer in a federal, civil, tax trial. The Court reasoned that the suppression theory was to act as a deterrent to police officers engaging in unconstitutional conduct. It concluded that the police officer never contemplated a subsequent civil tax proceeding at the time of his search and, therefore, suppression in such a case would have no deterrent effect. The opposite situation is present in the instant case. The officers involved were Internal Revenue Service officers and the case involved is a

case against those officers and the Internal Revenue Service.

Petitioner seeks return of the property which was illegally seized. Such is also a standard relief for an illegal seizure, see *One 1958 Plymouth Sedan v. Pennsylvania, supra.* Respondent argues that such a relief would be futile inasmuch as the Internal Revenue Service would merely seize again the automobiles. Petitioner would argue on the contrary that the respondents should not profit from its illegal conduct, *Wong Sun v. United States*, 371 U.S. 471 (1963). Further, assuming a magistrate's hearing or other hearing in accord with the requirement in *Shapiro*, there may be no necessity for seizure of the automobiles of petitioner. While the respondents have argued that the Tenth Circuit case has disposed of the factual matters, petitioner argues that it never had an opportunity to present its side of the case as noted in petitioner's Petition for Rehearing in the United States Court of Appeals for the Tenth Circuit. Petitioner never had an opportunity to present its side of the case. The burden of proof on both the assessment and the alter ego question was deemed to be on the government. At the end of the government's presentation of evidence, the petitioner moved for a judgment pursuant to the Federal Rules. That judgment was granted without petitioner giving forth its evidence. Thus, upon presentation of its evidence, it may be clear that the assessment was without basis in fact, and arbitrary and capricious and that the petitioner is not the alter ego, nominee, or transferee of taxpayer.

Finally, respondents argue that there can be no claim for damages as the Tenth Circuit Court of Appeals has already decided that the Internal Revenue agent, defendant, did not act with malice. There is no question that *Bivens v. Six, Unknown Fed. Narcotics Agents*, 403 U.S. 388 allows a claim for damages based on a violation of plaintiffs Fourth Amendment rights. Respondent argues that "even assuming arguendo," the agent's conduct violated the Fourth Amendment, petitioner would not be entitled to money damages if the agents acted in good faith. (Res. brief, page 80). Petitioner argued in the lower court and the trial court agreed that the agents had not acted in good faith and, in fact, the agent Phillip Clayton had acted with malice. This argument and finding was based upon the agent's derogatory statement to third persons about taxpayer; his participation in the seizures when such was not his job, and his initiation and control of all the events that occurred. Also taken into consideration on such finding was the completely excessive and erroneous assessment that he prepared against taxpayer.

The Tenth Circuit Court of Appeals reversed the trial court's finding of malice but even the Tenth Circuit failed to find that the agents acted in good faith, as distinguished from acting maliciously and, therefore, there is still an issue of fact to be determined for damages. Furthermore, during the course of the proceedings, the Internal Revenue Service allowed two of the seized automobiles to be sold by a creditor of petitioner. The petitioner sued for damages for the market value of those two automobiles, less what the

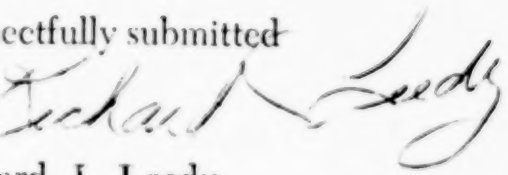
creditor gave petitioner credit for. This would also be a claim for damages against the government.

Therefore, petitioner claims the damage issue is not moot; that there are and is substantial relief that can be afforded by this court.

CONCLUSION

It is petitioner's position that its constitutional rights were violated by the seizure of its assets without notice, hearing, or a determination of probably cause by a neutral and detached magistrate. It is further petitioner's position that there is a remedy for such a constitutional violation of its rights and that such rights should be substantial for a general treatment of the subject see Rosenthal Jeopardy and Termination Assessments after *Laing and Hall*: Jeopardizing the Fourth Amendment, 31 Tax L. Rev. 317 (1976).

Respectfully submitted



Richard J. Leedy